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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1772 OF 2004

The State of Maharashtra,)
through Smt. Meera C. Borwankar,)
Jt. Commissioner of Police (Crime))
Mumbai.) ... Petitioner

Versus

Nitendrasingh @ Nitin Kumarsingh)
Patil, aged 40 years, Occ. Asstt.)
Police Inspector, Thane (Rural),)
Residing at: 203, Karmakshetra, Nr.)
Naupada Police Station, Thane (W).) ... Respondent

Mr. V.A. Thorat, Advocate General with Mr. B.R. Patil, Act.P.P., Ms. P.H. Kantharia, A.P.P. and Ms. U.V. Kejriwal, A.P.P. for the petitioner-State.

Ms. Asmita Sarangdhar for the respondent.

CORAM : SMT. RANJANA DESAI & A.S. OKA, JJ.

JUDGMENT RESERVED ON : 24TH NOVEMBER, 2004.

JUDGMENT PRONOUNCED ON : 22ND DECEMBER, 2004.

ORAL JUDGMENT:- (Per Smt. Ranjana Desai, J.)

1. This petition is filed by the State of Maharashtra through Smt. Meera Borvankar, the Joint Commissioner of Police (Crime), Mumbai, under Articles 226 and 227 of the Constitution of India and under section 482 of the Criminal Procedure Code, 1973 (for short, "the Code") challenging the orders dated 24/8/2004, 26/8/2004 and 30/8/2004 passed by the Special Judge under the Maharashtra Control of Organised Crime Act, 1999 (for

short, "the MCOCA") on Misc. Application No.243 of 2004 filed by the respondent (for convenience, "the complainant".) The complainant is the Assistant Police Inspector, Thane Rural. The petitioner is seeking a direction for quashing the impugned orders.

2. Since this petition arises out of the private complaint filed by the complainant, the gist of the allegations contained therein will have to be shortly stated. The complainant filed the said private complaint in the MCOCA Court at Bombay under section 3(2), 3(3), 3(4), 3(5), 4 and 24 of the MCOCA and under sections 120B, 143, 147, 149, 166, 182, 191, 192, 193, 195, 196, 218, 323 read with section 34 of the Indian Penal Code (for short, "the IPC") against 14 persons. Out of the said 14 persons who have been arraigned as the accused, 7 are police officers. One of the accused is a Sales Tax Officer. It is alleged in the complaint that there are in existence a large number of gangs which are indulging in the organised criminal activities of adulteration of petrol and diesel at the petrol pumps. The said gangs are procuring the petroleous adulterant chemicals through various sources for mixing them in the petrol and diesel. Their modus operandi consists of stealing the petrol and the diesel at illegal joints carried by the tankers from Government companies, mixing kerosene or Naphtha as substitutes, making forgery for the purpose of cheating, using forged document as genuine, opening regular workshops for processing on the imported Naphtha and

thereby converting Naphtha into an adulterant and using the same for the purposes of adulteration at the petrol pumps instead of selling it to the licensed companies, also using cheap blue subsidized kerosene for adulteration and thus compelling the common public to buy costly white imported kerosene by creating artificial shortage of the fuel.

3. According to the complainant, on 1/9/2003, he was attached to the Local Crime Branch, Thane Rural. During his patrolling duty, he seized a tanker carrying suspicious chemical product which was loaded at M/s. Kalpita Tex Chem (India) Pvt. Ltd., Silvassa and allegedly to be unloaded at M/s. Surjit Petro Chem Pvt. Ltd., Goa, as shown in the bill carried by the driver and took necessary action at Kasa Police Station, District Thane, as per section 41(1) (d) of the Code. The complainant arrested the driver Mr. Phuleshwar Yadav and sought his police custody, which was granted. During the course of investigation, the complainant recorded a number of statements. According to him, his investigation has revealed that the accused have formed an organised crime syndicate and have hatched a conspiracy and pursuant to the conspiracy they have committed several offences under the MCOCA. It is further alleged that these offences have been committed with active participation, help and assistance provided by the officers of the Police Department and various other Government Departments. The complaint recites the

particulars of the offences. According to the complainant, in order to keep him away from investigation and to facilitate the commission of an organised crime with the help of accused Jagan Pimple, the organised gang made one Sandeep Singh, a transport agent to file a concocted criminal complaint against the complainant and other officers that they demanded Rs.3,00,000/- as bribe on 1/9/2003 to release the tanker and asked the said Sandeep Singh to pay the bribe amount to one Himmat Nanda. According to the complainant, this is a false case and is merely a counterblast to the action taken by the complainant.

4. The complainant has prayed that in view of the responsible position held by the accused, the enquiry into these offences may be directed to be conducted by some independent investigating agency, preferably by the Central Bureau of Investigation (for short, "the CBI"), if found necessary. The complainant has also prayed that the court may take cognizance of the complaint and process may be issued against all the accused.

5. The Special Judge verified this complaint. After recording evidence of six witnesses, he gave exhaustive directions. We will have to reproduce those directions as it was strenuously contended that the Special Judge could not have stepped into the shoes of the Investigating Officer and given such directions. Following are the said directions.

"Smt. Meera Borvankar, Jt. Commissioner of Police (Crime) is hereby required and authorised to form team of independent honest fair and impartial police officers to assist her and to visit residential as well as office premises of the accused named in the complaint to be pointed out by the complainant for to carry out searches in presence of the respective person to seize incriminating documents and articles, if any, under the panchanama and to produce them before the court. An inventory of the property belonging to the accused shall be carried out or prepared so as to collect evidence about the property details for huge unlawful wealth, if any. A photostate copy of the panchanama drawn be handed over to the accused or occupant of the residential or office premises as the case may be and an acknowledgement be obtained in respect of the receipt of the copy under signature of the owner or occupant of the house or office premises as the case may be belonging to accused. Any house or office if found locked shall be sealed for to be unlocked later in presence of its owner or occupant possessing the keys if according to the complainant such premises is

belonging to the accused. The report to be made to this court about the investigation done. Regarding the mobile phone nos. or land line telephone nos. which were allegedly used by the accused or their associates for to hatch criminal conspiracy by or on behalf of the organized crime syndicate led by Vishnu Khendelwal and Jagan Pimple and aided by others as alleged, the evidence about record of telephonic communications in the form of printouts available with the telephone companies concerned such as Orange, BPL, Reliance, MTNL, Airtel, Dolphin, etc. for period between 16/8/2003 to 07/09/2003 be collected. The Applicant/complainant to co-operate with Jt. Commissioner of Police (Crime) Mrs. Meera Borvankar and police officers deputed by her in the investigation and inquiry pursuant to this order. Report consisting of material collected namely inquiry and investigation as ordered as also record collected be produced before this court along with the report to enable this court to initial judicial action according to law. Joint Commissioner of Police (Crime) to act swiftly on the basis of copy of the order authenticated by Sheristedar to avoid any

artificial manipulation or tampering of evidence by the person who may be interested to defeat legal process. Joint Commissioner of Police to act on authenticated copy. Issuance of process against the accused is therefore postponed until 29/09/2004. Complainant has furnished copies of the complaint and annexure along with copies of the application before this court and copies of the evidence recorded including verification statement be sent to Mrs. Meera Borvankar for compliance and report as early as possible."

6. On 26/8/2004 and 30/8/2004, the learned Special Judge passed consequential orders. These three orders and the investigation started pursuant to them are under challenge in this petition.

7. We have heard, at considerable length, Mr. Thorat, the learned Advocate General for the petitioner and Ms. Sarangdhar, the learned counsel appearing for the respondent.

8. Mr. Thorat, the learned Advocate General contended that the impugned orders are illegal and are passed on a misconstruction of the relevant provisions of the MCOCA and the Code and, hence, deserve to be set aside. He

contended that when a court is constituted under the Statute it possesses only powers conferred upon it by that Statute, unless by doctrine of incorporation, powers under the general law or special law are conferred on it. He submitted that the Special Court is constituted under the MCOCA and, hence, can function only in the area demarcated by the MCOCA and under the powers conferred upon it by the MCOCA. The Special Judge could not have resorted to the procedure prescribed under section 202 of the Code as he is not a Magistrate as defined in the Code. It cannot be said that the said powers are conferred upon the Special Judge by incorporation. Mr. Thorat further submitted that on a conjoint reading of sections 9(1), 9(4), 21, 23 and 25 of the MCOCA, it is evident that a valid sanction under section 23(2) thereof is a sine-quo-non for taking cognizance under section 9(1). The learned Special Judge, therefore, could not have proceeded to take cognizance and given various directions to the police in the absence of the sanction under section 23(2) of the MCOCA. His order, therefore, suffers from a serious infirmity and must be set aside. Mr. Thorat also contended that the MCOCA does not confer pre-cognizance powers upon the Special Judge and the only powers conferred on him are under Chapter 18 of the Code (sections 235 to 237). Mr. Thorat pointed out that whenever, the legislature intended that certain provisions of the Code will govern the proceedings under the Special Law i.e. MCOCA, it has made a specific reference to those provisions such as sub-sections 2 and

4 of section 9 and section 21. The MCOCA does not specifically state that the Special Judge can follow the procedure under Chapter 15 upon receipt of a private complaint. The Special Judge, therefore, erred in following the said procedure.

9. Mr. Thorat further contended that section 23 of the MCOCA is a safeguard to protect the interest of a citizen. It provides protection to a citizen against false involvement in the offence falling under the MCOCA. Section 23 prevents any officer from recording information about the commission of an offence of organized crime under the MCOCA without prior approval of the police officer not below the rank of Deputy Inspector General of Police and sub-section (b) of section 23 states that no investigation of an offence under the provisions of the MCOCA shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. Section 23(2) states that no Special Court shall take cognizance of any offence under the MCOCA without the previous sanction of the police officer not below the rank of Additional Director General of Police. Mr. Thorat contended that these provisions are intended to prevent misuse of drastic provisions of the MCOCA. Mr. Thorat contended that if the impugned orders are allowed to stand, it would take away the protection offered to a citizen under section 23 of the MCOCA and there would be a spate of frivolous complaints and hence this court should quash the impugned orders.

10. Relying on **Rambhai Nathabhai Gadhvi and others v. State of Gujarat, (1977) 7 SCC 744 and the State of H.P. v. M.P. Gupta, (2004) 2 SCC 349**, Mr. Thorat contended that in the absence of sanction under section 23(2) of the MCOCA, the learned Special Judge could not have taken cognizance of the offence and given such directions. Mr. Thorat further contended that the court cannot trench upon the mode and method of the investigation carried out by the police. The learned Special Judge could not have given such detailed directions which gives an impression that the court itself was an Investigating Agency. Relying on **Hemant Dhasmana v. Central Bureau of Investigation and another, 2001 SCC (Cri.) 1280**, Mr. Thorat contended that in any event, the learned Special Judge could not have directed the investigation to be carried out by any particular police officer. He contended that the impugned order which directs the investigation to be carried out by Smt. Meera Borvankar exhibits impropriety. Mr. Thorat further contended that the judgment of the learned single judge in **Dayanand B. Nayak v. Ketan K. Tirodkar & Anr., 2004 All.M.R. (Cri.) 1689**, does not state the law correctly as certain vital aspects were not brought to the notice of the learned single judge.

11. Mr. Thorat also contended that the complaint contains frivolous allegations. The provisions of the

MCOCA and other penal sections can never be applicable to the police officers named as accused in the complaint.

12. We must note that though several legal points have been raised by the learned Advocate General not one of them is raised in the petition. The petition merely contains submissions on merits of the case and seeks quashing of the impugned orders. We find it surprising that the petition should not contain the legal submissions advanced by the learned Advocate General. However, since the points raised are legal, we would deal with them. Besides the complainant has not raised any objection to the legal points being raised by the petitioner.

13. Ms. Sarangdhar, the learned counsel for the complainant, contended that the present petition is filed by Smt. Borvankar in her personal capacity. The State of Maharashtra has, therefore, no locus standi. She drew our attention to section 4(2) of the Code and contended that since the MCOCA does not lay down what procedure has to be followed by the Special Court after a private complaint is entertained, the Special Court will have to follow the procedure prescribed under the Code and, therefore, the learned Special Judge has committed no illegality in following the procedure prescribed under section 202 of the Code. She submitted that the Special Judge can follow the procedure prescribed under Chapter XV of the Code. The learned counsel placed heavy

reliance on **Dayanand Nayak's case (supra)**. She also relied on **Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi and others, AIR 1976 SC 1947** and contended that once the Special Judge has exercised his discretion and ordered an enquiry under section 203 of the Code, the High Court cannot substitute its own discretion for that of the Special Court or to examine the merit of the case with a view to finding out whether or not the allegations in the complaint are true and ultimately end in the conviction of the accused. She also relied on **Shambhoo Nath Misra v. State of U.P. and others, 1997 Cr.L.J., 2491 and Gangula Ashok and another v. State of A.P., (2000) 2 SCC 504**. The learned counsel contended that the Special Court has followed the correct procedure and considering the seriousness of the allegations, this court should not interfere with the impugned orders.

14. So far as the contention raised in the petition that no offence is made out against the police officers is concerned, we are unable to come to any such conclusion at this stage. It is not for us, at this stage, to opine whether the accused would be ultimately convicted or not. We are unable to examine the merits of the case. It is for the trial court to examine the merits of the case. We only propose to examine the legal submissions.

15. Similar legal questions were raised before the learned single judge of this court (B.H. Marlapalle, J.) in **Dayanand B. Nayak's case (supra)**. The judgment in

this case is the sheet-anchor of the complainant. In that case, respondent 1 therein claimed to be a journalist and associated with the petitioner therein in the alleged organised crime under the MCOCA. The petitioner was working as Police Sub-Inspector attached to the Crime Investigation Unit of the Crime Branch of Mumbai Police. Respondent 1 approached the Special Court constituted under the MCOCA and filed Misc. Application. The learned Special Judge, after noticing the provisions of sections 9(1) and 23 of the MCOCA held that the complaint by a citizen can be entertained by the Special Court in respect of the fact which may constitute offence punishable under the MCOCA along with offences punishable under the Indian Penal Code and other penal statutes. He directed that the Misc. Application filed by respondent 1 therein be registered as Special Case. On the next day, he recorded the verification of respondent 1 (the complainant) under section 200 of the Code. He postponed the issuance of process and proceeded to record evidence of some witnesses. He issued search warrant pursuant to which search was conducted of the house of the accused. The petitioner therein then became aware of the complaint filed by the complainant therein and, being aggrieved by the orders passed by the Special Court entertaining a private complaint, moved this court under Article 226 of the Constitution of India. The following questions were raised for consideration of the learned single judge.

(a) Whether a private complaint could be

entertained by the Special Court constituted under MCOCA in view of the provisions of section 9(1) therein,

(b) Whether the court could take cognisance of such complaint unless requirements of section 23(2) of MCOCA were satisfied, and

(c) Whether the Special Court committed an error apparent on the face of the record in entertaining the said private complaint.

16. The learned single judge referred to the preamble of the MCOCA, which shows that it was enacted for making the special provision for prevention and control of and for coping with, criminal activity by the organised crime syndicate or gang and for matters connected therewith or incidental thereto. The learned single judge also referred to the statement of objects and reasons of the MCOCA, which notes that the existing legal frame work i.e. the penal and procedural laws and the adjudicatory system are found to be rather inadequate to curb or control the menace of organised crime and, therefore, Government decided to enact a special law with stringent and deterrent provisions including in certain circumstances power to intercept wire, electronic or oral communication to control the menace of the organised

crime. The learned single judge then noted the salient provisions of the MCOCA. He referred, inter alia, to section 5, which provides for establishment of Special Courts by the State Government with the concurrence of the Chief Justice of this court. He referred to section 6 of the MCOCA which deals with jurisdiction of the Special Court and section 7 of the MCOCA which deals with the power of the Special Courts with respect to other offences. He referred to section 8 which provides for appointment of the Special Prosecutor and section 9 which deals with the procedure and powers of the Special Court. He referred to section 21 which provides for a modified application of certain provisions of the Code and which, inter alia, states that section 167 of the Code shall apply in relation to a case involving an offence punishable under this Act with certain modifications. He then referred to section 23 which deals with the procedure for taking cognisance and enquiry into an offence.

17. The learned single judge quoted section 9 and section 23 of the MCOCA. It is necessary for us to do likewise.

> "**9. Procedure and powers of Special Court.** --- (1) A Special Court may take cognizance of any offence without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such

offence or upon a police report of such facts.

(2) Where an offence triable by a Special Court is punishable with imprisonment for a term not exceeding three years or with fine or with both, the Special Court may, notwithstanding anything contained in sub-section (1) of section 260 or section 262 of the Code, try the offence in summary way in accordance with the procedure prescribed in the Code and the provisions of sections 263 to 265 of the Code shall, as far as may be, apply to such trial:

Provided that, where in the course of a summary trial under this sub-section, it appears to the Special Court that the nature of the case is such that it is undesirable to try in a summary way, the Special Court shall recall any witnesses who may have been examined and proceed to re-hear the case in the manner provided by the provisions of the Code for the trial of such offence and the said provisions shall apply to and in relation, to a Special Court as they apply to and in relation, to a Magistrate:

Provided further that, in case of any conviction in a summary trial under this section, it shall be lawful for a Special Court to pass a sentence of imprisonment for a term not exceeding two years.

(3) A Special Court may, with a view to obtaining the evidence of any person, supposed to have been directly or indirectly concerned in or privy to an offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abetter, in the commission thereof, and any pardon so tendered shall, for the purposes of section 308 of the Code, be deemed to have been tendered under section 307 thereof.

(4) Subject to other provisions of this Act, a Special Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, so far as may be, in accordance with the procedure prescribed in the Code for the trial before a Court of Session.

23. Cognizance of, and investigation into, an offence. --- (1) Notwithstanding anything contained in the Code, ---

(a) no information about the commission of an offence of organised crime under this Act, shall be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police;

(b) no investigation of an offence under the provisions of this Act shall be carried out by a police officer below the rank of the Deputy Superintendent of Police.

(2) No Special Court shall take cognizance of any offence under this Act without the previous sanction of the police officer not below the rank of Additional Director General of Police."

18. The learned single judge then observed and, in our opinion, rightly that sub-section (1) of section 9 states that the Special Court may take cognizance of any offence

without the accused being committed to it for trial, upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. It was then observed that this provision is in line with the provisions of section 190 of the Code in Chapter XIV which is titled as "conditions requisite for initiation of proceedings". It was rightly observed that the words "when the accused being committed to it for trial" have been obviously added in section 9(1) of the MCOCA to get over the bar of section 193 of the Code. The learned single judge concluded that the Special Court has power to entertain a private complaint under section 9(1) of the MCOCA directly. We are entirely in agreement with the learned single judge so far as this conclusion is concerned.

19. In **A.R. Antulay v. Ramdas Sriniwas Nayak and another, (1984) 2 SCC 500**, the Supreme Court was considering whether the Special Judge under the Prevention of Corruption Act could take cognizance of an offence enumerated in section 6(1) (a) and (b) of the Prevention of Corruption Act upon a private complaint of facts constituting the offences. It is true that the provisions of the Prevention of Corruption Act are not identical with the provisions of the MCOCA. However, certain basic principles were discussed by the Supreme Court to which we can usefully refer. The Supreme Court observed that it is a well recognised principle of criminal jurisprudence that anyone can set or put the

criminal law into motion except where the statute enacting or creating an offence indicates to the contrary. It was observed that the scheme of the Code envisages two parallel and independent agencies for taking criminal offences to court. Even for the most serious offence of murder, it was not disputed that a private complaint can, not only be filed but can be entertained and proceeded with according to law. Locus standi of the complainant is a concept foreign to criminal jurisprudence save and except that where the statute creating an offence provides for the eligibility of the complainant, by necessary implication the general principle gets excluded by such statutory provision. While section 190 of the Code permits anyone to approach the Magistrate with a complaint, it does not prescribe any qualification the complainant is required to fulfil to be eligible to file a complaint. It was further observed that the principle that anyone can set or put the criminal law in motion remains intact unless contra-indicated by a statutory provision. The Supreme Court further observed that this general principle of nearly universal application is founded on a policy that an offence i.e. an act or omission made punishable by any law for the time being in force is not merely an offence committed in relation to the person who suffers harm but is also an offence against the society.

20. We do not find that there is any contra-indication

in the MCOCA which prevents an individual from filing a complaint and the Special Court from entertaining it.

21. It was argued that assuming a private complaint can be entertained, the Special Judge could not have resorted to the procedure prescribed under section 202 of the Code as he is not a Magistrate as defined in the Code. The said powers are not conferred on the Special Judge by incorporation. It was argued that contra-indication is found in section 9(4) of the MCOCA, because under that provision, the Special Court has, for the purpose of trial of any offence, powers of a court of Sessions, and has to try offences as if it were a court of Sessions, as far as may be in accordance with the procedure prescribed under the Code. The MCOCA does not provide for pre-cognizance powers of the Special Judge and only powers conferred on him are those under Chapter XVIII of the Code which are post-cognizance powers. It was further contended that the Special Judge has followed procedure laid down under Chapter XV, which relates to post-cognizance stage. He could not have adopted that procedure because section 23(2) of the MCOCA puts fetters on the power of the Special Court of taking cognizance of any offence under the MCOCA without the previous sanction of the police officer not below the rank of the Additional Director General of Police and such a sanction was absent in the present case.

22. On the other hand, Ms. Sarangdhar, the learned

counsel for the complainant drew our attention to section 4 of the Code to contend that in the absence of a specific provision under the MCOCA, the Special Judge upon entertaining a complaint must follow the procedure provided under Chapter XV of the Code. She relied on the observations made by the learned single judge in **Dayanand's case (supra)** that "In a private complaint entertained by the Special Court under section 9(1) of the MCOCA, the steps taken under section 200 are procedural requirements and if the learned Special Judge proceeds to verify the complaint and records the statement of witnesses on oath, it cannot be termed as an action of taking cognizance."

23. We are unable to accept any submission which will render either section 9(1) or section 23(2) of the MCOCA otiose. In our opinion, the provisions of the MCOCA will have to be harmoniously construed to achieve its purport. Section 9(1) does away with the requirement of committing the accused to the Special Court for trial and states that cognizance can be taken upon receiving a complaint of facts which constitute such offence or upon a police report of such facts. A private complaint is clearly contemplated under section 9(1). To arrive at this conclusion, it is not necessary to dwell on the question whether the Special Judge is a Magistrate or a Sessions Judge. On a fair reading of the provisions of the MCOCA, it appears to us that the Court of Special Judge is a court of original criminal jurisdiction. In order to

make it functionally oriented some powers are conferred on it by the MCOCA which has set it up. No debate is necessary where powers are specifically conferred on it or specifically denied to it. On a proper reading of section 9(1) and on the basis of basic principles of criminal jurisprudence enunciated by the Supreme Court in **Antulay's case (supra)**, in our opinion, under section 9(1), a Special Court can, therefore, entertain a private complaint. But he can take cognizance only after sanction under section 23(2) is received.

24. From the order of the learned Special Judge it is clear that he has followed procedure under Chapter XV of the Code. He has verified the complaint. He has examined the witnesses and given detailed directions to the police to carry out investigation. The Joint Commissioner of Police is directed to submit report to him of the enquiry and investigation carried out by him to enable him to initiate judicial action according to law. He has postponed the issuance of process. The question is whether the Special Judge has taken cognizance and, if yes, whether he could have done so in the absence of sanction and in the teeth of section 23(2) of the MCOCA. It is, therefore, necessary to see what is meant by the words "take cognizance".

25. In **Tula Ram and others v. Kishore Singh, (1977) 4 SCC 459**, the Supreme Court explained the words "taking cognizance". The Supreme Court observed as under:

"The expression "taking cognizance" in Section 190 of the Code of Criminal Procedure, 1973 merely means judicial application of mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives :

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue

> or process and direct an enquiry by any other person or an investigation by the police.

The Supreme Court further observed that -

> While Chapter 14 (under which Section 190 falls) deals with post-cognizance stage, Chapter 12 (under which Section 156 falls), so far as the Magistrate is concerned, deals with pre-cognizance stage. Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. A Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say before taking cognizance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 207 of the Code."

26. In **Jamuna Singh and others v. Bhadai Shah, AIR 1964 SC 1541**, the Supreme Court examined a similar question

and held as under:

> "When on a petition of complaint being filed before him the Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he must be held to have taken cognizance of the offences mentioned in the complaint. When, however, he applies his mind not for such purpose but for purposes of ordering investigation under S. 156(3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence."

27. In **State of West Bengal and another v. Mohd. Khalid and others, (1995) 1 SCC 684,** the Supreme Court explained the meaning of the words "taking cognizance" as under:

> "Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps

> to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons. It has thus, reference to the hearing and determination of the case in connection with an offence."

28. In **Suresh Chand Jain v. State of M.P. and another, (2001) 2 SCC 628**, while dealing with the difference between investigation under section 156 and section 202 of the Code, the Supreme Court observed as under:

> "Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to "direct an investigation by a police officer". But the investigation envisaged in Section 202 is different from the investigation contemplated in section 156 of the Code. The significant point to be

noticed is that when a Magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence. A Magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence he has to follow the procedure envisaged in Chapter XV of the Code. A reading of section 202(1) CrPC would convince that the investigation referred to therein is of a limited nature. The Magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the Magistrate to decide whether or not there is sufficient ground for him to proceed further."

29. In fact, the judgment of the Supreme Court in **Gopal Das Sindhi and others v. State of Assam and another, AIR 1961 SC 986**, on which the learned single judge has placed reliance reiterates the same law. The Supreme Court has observed that -

"The provisions of section 190 do not mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose

the commission of any offence. The word 'may' in S.190 cannot be construed to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under S.156 (3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code."

The Supreme Court has further observed that -

"When a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g., ordering investigation under S.156 (3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence."

30. If we examine this case in the light of the above observations of the Supreme Court, it must be held that by recording the verification of the complaint and by recording the evidence of witnesses and by proceeding under section 202 of the Code after application of mind to the complaint, the learned Special Judge has taken cognizance of the offence. He could not have done so without the sanction in view of section 23(2) of the MCOCA. No exercise in construction of sections can be undertaken which would negate or whittle down this salutary provision. Section 25 of the MCOCA states that the provisions of the MCOCA or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having the force of law. The MCOCA has an overriding effect. The requirement of sanction, therefore, cannot be ignored. Hence, though we concur with the learned single judge that a private complaint can be entertained by a Special Judge, with respect, we are unable to concur with him when he observes that after entertaining the complaint directly under section 9(1), the Special Court can follow the procedure prescribed under Chapter XV in the absence of a sanction. With respect, in the light of the above judgments of the Supreme Court, the conclusion reached by the learned single judge that in a private complaint entertained by the Special Court under section 9(1) of the MCOCA, the steps taken under section 200 of the Code are procedural

requirements and if the learned Sessions Judge proceeds to verify the complaint and record the statements of the witnesses, it cannot be termed as an action of taking cognizance, does not appear to us to be correct. Because pre-cognizance powers are not specifically stated in the MCOCA, post-cognizance powers under the Code cannot be treated as procedural requirements at the pre-cognizance stage. In such a situation, as per section 4(2) of the Code, the Special Judge could have resorted to section 156(3) of the Code which contains pre-cognizance powers and being a court's direction the requirement of prior approval contemplated by clause (a) of sub-section 1 of section 23 of the MCOCA will not come in the way of the investigating agency in proceeding further. After the submission of the report by the police, the appropriate authorities could have granted sanction and it is only then that the Special Judge could have taken cognizance. In this case, the Special Judge has taken cognizance without a sanction which, in our opinion, is wrong because section 23(2) of the MCOCA which states that a sanction is required, cannot be ignored.

31. In this connection, we may refer to the decision of the Supreme Court in **Rambhai's case (supra)** where the Supreme Court was dealing with a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987 (for short, "the TADA"). Section 20-A(2) of the TADA are pari-materia with the provisions of section 23(2) of the MCOCA. On the facts of that case, the Supreme Court came to the conclusion that it cannot be said that the

Sanctioning Authority granted sanction after applying its mind effectively and after reaching a satisfaction that it is necessary in public interest that the prosecution should be launched against the accused under the TADA. The Supreme Court then referred to Section 20-A(2) of the TADA, which makes the sanction a sine-qua-non for prosecution and observed as under:

> "Taking cognizance is the act which the Designated Court has to perform and granting sanction is an act which the sanctioning authority has to perform. Latter is the condition precedent for the former. Sanction contemplated in the sub-section is the permission to prosecute a particular person for the offence or offences under TADA. Sanction is not granted to the Designated Court to take cognizance of the offence but it is granted to the prosecuting agency to approach the court concerned for enabling it to take cognizance of the offence and to proceed to trial against the persons arraigned in the report. Thus a valid sanction is sine qua non for enabling the prosecuting agency to approach the court in order to enable the court to take cognizance of the offence under TADA as disclosed in the report. The corollary is that, if there was no valid

> sanction the Designated Court gets no jurisdiction to try a case against any person mentioned in the report as the court is forbidden from taking cognizance of the offence without such sanction. If the Designated Court has taken cognizance of the offence without a valid sanction, such action is without jurisdiction and any proceedings adopted thereunder will also be without jurisdiction".

32. In **M.P. Gupta's case (supra),** the Supreme Court was considering section 197 of the Code, which makes requirement of obtaining sanction to prosecute a public servant mandatory. The Supreme Court held that the bar under section 197 is absolute and complete and the court cannot take cognizance of the complaint against a public servant unless the sanction is obtained from the appropriate authority. The Supreme Court explained the word "cognizance". The following observations of the Supreme Court are material:

> "So far as public servants are concerned, the cognizance of any offence, by any court, is barred by Section 197 CrPC unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of official duty. The said section not only

specified the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, "no court shall take cognizance of such offence except with the previous sanction". Use of the words "no" and "shall' makes it abundantly clear that the bar on the exercise of power of the court to take cognizance of any offence is absolute and complete. The very cognizance is barred. That is, the complaint cannot be taken notice of. The word "cognizance" means "jurisdiction" or "the exercise of jurisdiction" or "power to try and determine causes". In common parlance, it means taking notice of. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have been committed during discharge of his official duty."

33. In our opinion, the ratio of the above cases is

clearly attracted to the present case. We fail to understand how the Special Court has taken cognizance of the complaint in the absence of the sanction as required under section 23(2) of the MCOCA. With respect, we are of the opinion that the reliance placed by the learned single judge on **Jaysingh Wadhu Singh v. State of Maharashtra and others, 2001 (5) Bom.C.R. 470,** is not correct. In that case, the charge-sheet was filed on 12/6/2000. Sanction as required under section 19 of the Prevention of Corruption Act was granted by the Government on 8/8/2000 and the said order was produced before the Special Court on 9/8/2000. The Division Bench of this court distinguished the decision in **Basanta Chandra Ghose v. Emperor, AIR 1945 (32) F.C. 16** and observed that the evidence was already collected and the chargesheet was submitted. This court further observed that from the investigation papers, it was for the Special Court to find out as to whether material collected, inter alia, revealed commission of offence punishable under the Prevention of Corruption Act. It was clarified that in such set of circumstances, merely because the chargesheet came to be filed; earlier than the date of production of sanction order before the court, it cannot be said that the court would not have jurisdiction to frame the charge and hold the trial of the case for the offence punishable under the Prevention of Corruption Act particularly when the sanction order was produced before framing of the charges. In our opinion, the decision of this court in **Jaysingh's case**

(supra) must be confined to its own peculiar facts. It was because the evidence was already collected and chargesheet was submitted that this court made the above observations in the context of jurisdiction of the court to frame a charge. It would not be possible for us to hold, on the basis of the above observations, that in all cases the Special Court can take cognizance of a private complaint in the absence of sanction. That would render section 23(2) nugatory. In our opinion, that can never be the intention of the legislature.

34. Even if we treat the order passed by the Special Court as one under section 156(3) of the Code, the question is whether the Special Court could have given such directions. In **Emperor v. Khwaja Nazir Ahmad, AIR 1945 PC 18**, while dealing with the statutory right of the police under sections 154 and 156 of the Code within its province of investigation of a cognizable offence, the Privy Council has made the following observations:

> "... so it is of the utmost importance that the judiciary should not interfere with the police in matters which are within their province and into which the law imposes upon them the duty of enquiry. In India as has been shown there is a statutory right on the part of the police to investigate the circumstances of an alleged cognizable crime without requiring

> any authority from the judicial authorities, and it would, as their Lordships think, be an unfortunate result if it should be held possible to interfere with those statutory rights by an exercise of the inherent jurisdiction of the court. The functions of the judiciary and the police are complementary not overlapping and the combination of individual liberty with a due observance of law and order is only to be obtained by leaving each to exercise its own function, always, of course, subject to the right of the court to intervene in an appropriate case when moved under Section 491, CrPC to give directions in the nature of habeas corpus. In such a case as the present, however, the court's functions begin when a charge is preferred before it and not until then."

35. In **State of Bihar v. J.A.C. Saldanha, (1980) 1 SCC 554**, while dealing with the powers of investigation of a police officer as contemplated in section 156 of the Code, the Supreme Court observed as under:

> "There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field

exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the court requesting the court to take cognizance of the offence under section 190 of the Code its duty comes to an end."

36. In **State of Haryana & Others v. Bhajanlal & Others, 1992 SCC (Cri.) 426**, the Supreme Court was dealing with the scope of sections 156 and 157 and 159 of the Code. The Supreme Court observed that the core of the sections is that if a police officer has reason to suspect the commission of a cognizable offence, he must either proceed with the investigation or cause an investigation to be proceeded with by his subordinate; that in a case where the police officer sees no sufficient ground for investigation, he can dispense with the investigation

altogether; that the field of investigation of any cognizable offence is exclusively within the domain of the investigating agencies over which the courts cannot have control and have no power to stifle or impinge upon the proceedings in the investigation so long as the investigation proceeds in compliance with the provisions relating to investigation and that it is only in a case wherein a police officer decides not to investigate an offence, the concerned Magistrate can intervene and either direct an investigation or in the alternative, if he thinks fit, he himself can, at once proceed or depute any Magistrate subordinate to him to proceed to hold a preliminary inquiry into or otherwise to dispose of the case in the manner provided in the Code.

37. Therefore, in our opinion, the Special Judge could not have given such directions to the Investigating Agency. The Special Court should have left the Investigating Agency free to take such steps as it deemed fit. It is only if the Investigating Agency were to decide not to investigate that he could have intervened. The next question is whether the Special Judge could have directed a named officer to conduct the investigation. It is true that under section 23(1) of the MCOCA information about the commission of an offence of organised crime under the MCOCA cannot be recorded by a police officer without the prior approval of the police officer not below the rank of the Deputy Inspector General of Police and that no investigation of an offence

under the provisions of the MCOCA shall be carried out by a police officer below the rank of the Deputy Superintendent of Police. This provision does indicate that considering the serious nature of the offences under the MCOCA and the drastic procedure prescribed thereunder, the investigation of the said offence has to be conducted by higher officers but, in our opinion, the Special Judge could not have directed a particular officer to carry out the investigation. In **Hemant Dhasmana v. Central Bureau of Investigation and another, 2001 SCC (Cri.) 1280**, the Chief Commissioner of Income Tax, Kanpur was alleged to have demanded a bribe from the appellant therein. The appellant therein forwarded a complaint to the DIG of CBI. CBI carried out the investigation and submitted final report before the Special Judge, Anti Corruption (Central) Lucknow. In its report, the CBI exonerated the accused in full measure. The Special Judge on receipt of the final report issued notice to the appellant and after hearing him, ordered CBI to re-investigate the matter by a DIG-level officer as according to him, the investigation was not properly conducted. CBI moved the High Court in revision against the said order of the Special Judge. The High Court observed that the Special Judge could have either rejected or could have accepted the final report after applying his judicial mind and, there was no sense in ordering a fresh investigation in disregard of provisions of section 173(8) of the Code. It was not a case of further investigation. The High Court further observed

that the Special Judge could not have directed a particular officer or even an officer of a particular rank to conduct further investigation. The appellant challenged the said order in the Supreme Court. The Supreme Court held that the Magistrate could, in exercise of powers under section 173(8) of the Code, direct the CBI to further investigate the case. The Supreme Court restored that part of the order of the Special Judge. The Supreme Court, however, recorded its agreement with the observations of the High Court that the Special Judge could not direct that a particular police officer or even a particular rank of police officer should conduct the further investigation. The Supreme Court observed that it was not within the province of the Magistrate while exercising the power under section 173(8) to direct any particular officer to conduct any such investigation, not even to suggest the rank of the officer who should conduct such investigation. The Supreme Court, therefore, set aside the Special Judge's order that the investigation shall be conducted by an officer in the rank of DIG, CBI.

38. While it is true that as per the provisions of section 23(1)(b) of MCOCA, the investigation will have to be carried out by a police officer above the rank of the Deputy Superintendent of Police, the Special Court could not have named a particular police officer to conduct the investigation as has been done in the instant case. The decision as to who should carry out the investigation

should obviously be taken by the Investigating Agency. We appreciate the contention of the learned Advocate General that the order directing a particular named officer to carry out the investigation is improper.

39. The following conclusions emerge from the above discussions:

1) The Special Court under the MCOCA is a court of original criminal jurisdiction.

2) A sanction under section 23(2) of the MCOCA is a sine-quo-non for taking cognizance of a private complaint.

3) The Special Court cannot take steps under Chapter XV of the Code unless the sanction is obtained. However, prior to the sanction, it can take resort to section 156(3) of the Code.

4) As per section 9(4) of the MCOCA, for the purpose of trial, the Special Court will have all the powers of a court of sessions as far as may be, in accordance with the procedure prescribed in the Code for the trial before a court of Sessions.

40. During the course of argument, an apprehension was expressed that in a case like this, where high officials of the State Government or the Police Department are the accused, the State may not grant sanction and, therefore, the Special Judge cannot be expected to await sanction. While meeting this submission, the learned Advocate General Mr. Thorat contended that in such a situation the aggrieved complainant can always approach this court in its writ jurisdiction. We do not want to go into this aspect of the matter because that is really not in issue before us but since this submission was advanced, we may refer to the observations of the Supreme Court in **Naga People's Movement of Human Rights v. Union of India, (1998) 2 SCC 109**, where the Supreme Court was considering the constitutional validity of Armed Forces (Special Powers) Act, 1958 (as amended). Section 6 thereof, states that no prosecution suit or other legal proceedings shall be instituted against any person in respect of anything done or purported to be done in exercise of the powers conferred under the said Act except with the previous sanction of the Central Government. The conferment of such a protection was assailed on the ground that it virtually provided immunity to persons exercising the powers conferred under section 4. While holding that there was no merit in the challenge to the validity of section 6, the Supreme Court held that it was of the view that the order of the

Central Government refusing or granting sanction was subject to judicial review.

41. In the view that we have taken, we have no option but to set aside the impugned orders and remand the case to the learned Special Judge to deal with it afresh, in the light of the above observations made by us. Hence, we pass the following order:

O R D E R:

(a) The orders dated 24/8/2004, 26/8/2004 and 30/8/2004 passed by the Special Judge under the MCOCA on Misc. Application No.243 of 2004 are quashed and set aside. The case is remanded to the learned Special Judge with a direction that he should deal with it afresh, in the light of the observations made by us in this judgement.

(b) Needless to say that the Special Judge can take cognizance of the complaint only after the requisite sanction is granted by the Sanctioning Authority.

(c) Petition is disposed of in the aforestated terms.

(SMT. RANJANA DESAI, J.)

(A.S. OKA, J.)